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SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. CHATURVEDI (India)
(Vice-Chairman)

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In the absence of Mr. Lamptey (Ghana), Mr. Chaturvedi (India), Vice-Chairman, took the Chair.

The meeting was called to order at 3.30 p.m.

AGENDA ITEM 141: QUESTION OF RESPONSIBILITY FOR ATTACKS ON UNITED NATIONS AND ASSOCIATED PERSONNEL AND MEASURES TO ENSURE THAT THOSE RESPONSIBLE FOR SUCH ATTACKS ARE BROUGHT TO JUSTICE (continued) (A/49/22; A/C.6/49/L.4 and L.9)

1. Mrs. CUETO MILIAN (Cuba) said that, taking into consideration the questions posed by certain critical aspects of the security of United Nations and associated personnel, her delegation had important reservations as to the letter and spirit of some provisions of the draft convention. The scope of the convention had not been clearly defined. The article on definitions should be more precise, and its relationship to the penal provisions contained in other articles taken into account. "United Nations operations" should essentially mean peace-keeping operations authorized by the Security Council with the consent of Member States and directed and controlled by the United Nations. The Charter of the United Nations stated clearly in Article 2, paragraph 7, that nothing contained in the Charter should authorize the United Nations to intervene in matters which were essentially within the domestic jurisdiction of any State. All arrangements adopted must therefore be founded on the principle of the agreement of all States involved in the establishment of the peace-keeping operation. In a statement made on 30 May 1990, the President of the Security Council affirmed that peace-keeping operations should be undertaken only with the agreement of the host country and the parties concerned and urged all parties to help the United Nations to fulfil its mandate by facilitating the deployment of troops and the smooth functioning of the operation.

2. Article 9 of the draft convention should not restrict the discretionary power of States to determine the most appropriate and expeditious means by which to incorporate an international legal instrument into their internal judicial system. The exceptions provided for in article 20 should not have the effect of limiting the principle of the sovereignty of States nor the principle of obtaining their prior agreement.

3. Her delegation recognized the important contribution made by United Nations and associated personnel to the maintenance of international peace and security, and condemned any action or deliberate attack against them. Equally, it recognized that effective measures must be adopted in order to prevent and punish such acts. However, that objective could be achieved only if the spirit and letter of the convention reflected the delicate balance of interests and principles underlying that question, and if the convention became an effective and universally accepted instrument not only for States providing troops, but equally for host States. The signature to and ratification of the future convention by Cuba would depend on the effectiveness and universality of that instrument, as well as on the compatibility of its provisions and aims with the fundamental principles of international law, such as the sovereignty of States and non-interference in internal matters.

4. Ms. DAUCHY (Secretary of the Committee) said that Namibia and the Republic of Korea had become sponsors of draft resolution A/C.6/49/L.9.

AGENDA ITEM 143: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (A/C.6/49/L.2)

5. Mr. ROGACHEV (Russian Federation) said that a convention on jurisdictional immunities of States and their property would make economic and other relations between States and economic agents more transparent, and that efforts to produce such a convention should be continued. The last series of negotiations had not succeeded because some delegations had not shown the political will necessary to arrive at a compromise. Although some differences had, to a certain extent, been settled during informal consultations, his delegation felt that, in future, negotiations should take place within the framework of a diplomatic conference. The convention should have a global character and would require the participation of a large number of States. Delegations to a conference would also have much wider powers than during informal consultations. The Russian Federation was open to all constructive proposals which would lead to a solution to the problem, and it refused to consider the situation as hopeless.

6. Ms. SAEKI (Japan) expressed the hope that the draft articles on the jurisdictional immunities of States and their property would be adopted as soon as possible and was glad to see the pragmatic approach adopted during the consideration of them. That approach should facilitate the establishment of a consensus on the range of activities to which the jurisdictional immunities should be applied. There were still important differences, however, notably on the question of the criteria to be used to determine the commercial character of the contract for transaction and on the question of measures of constraint.

7. The first question was fundamental. Her delegation felt that the suggestion proposed by the Chairman of the informal consultations, which would give States the option of indicating the potential relevance of the criterion of purpose under their national law and practice, was not sufficient to reconcile the views of States which felt that the nature of a contract or transaction should be the primary criterion for determining whether it was of a commercial character, and those whose view was that the purpose of the transaction should also be an important criterion. The criterion of purpose was too subjective and the criterion relating to the nature of the contract, while essential, was too vague to be applicable in all cases. It was therefore necessary to elaborate on the latter criterion in order to make it more precise and concrete and limit the possibilities for arbitrary interpretation.

8. With reference to the measures of constraint against the property of a State, her delegation was of the view that States should concentrate on defining the properties against which measures of constraint might be taken, and the degree of connection between such State property and the dispute in question.

9. She drew the Committee's attention to the question of the treatment to be accorded to the armed forces of one State stationed in another State. The status of such forces and their privileges and immunities were generally

provided for in an agreement between the two States, on the basis of a delicate balance between their interests, and often dealt with jurisdictional immunity. Therefore, the establishment of uniform multilateral rules covering civil jurisdictional immunity for foreign armed forces stationed in a host country could affect that bilateral balance, and the treatment to be accorded to the armed forces in question by virtue of those roles could be at variance with the nature of the bilateral relations existing between the two States. The Japanese Government therefore considered the question of the jurisdictional immunity of foreign armed forces should be regulated by bilateral agreements between the sending State and the host State, the armed forces of a State stationed on the territory of another State being in all cases excluded from the scope of the present draft articles and from any convention which might result therefrom.

10. Miss BARRETT (United Kingdom) welcomed the informal consultations concerning the draft articles on the jurisdictional immunities of States and their property, which had enabled delegations to reconcile their views on the basic issues raised, in particular regarding the immunity of constituent units of a federal State and contracts of employment. None the less, she still had doubts about whether article 10, paragraph 3 (Commercial transactions), relating to State responsibility should be included in a convention on jurisdictional immunities, although she was willing to reflect further on the matter. There remained, however, several other issues the future of which was not at all clear.

11. First, with regard to the criteria for determining the commercial character of a contract or transaction, she could not accept the suggestion by the Chairman of the informal consultations to give States the option of indicating the potential relevance of the purpose criterion under their national law and practice, by means of either a general declaration in relation to the convention or a specific notification to the other party to the contract or transaction. For if it were possible for a court rule that a commercial transaction in fact enjoyed immunity owing to a governmental purpose which had not been disclosed to the private party at the time the transaction was concluded, commercial uncertainties might result. None the less, for the sake of the delegations in favour of the purpose criterion, her delegation was willing to accept that the purpose could be taken into account by the court if the parties had so agreed at the outset. However, it was not reasonable to expect a private party, which might be a small trader, to have to research general declarations made by States before entering into transactions with them, when they might not even realize that immunity was a potential problem. Clearly, more work had to be done on the issue, which was central to the convention, before a generally acceptable solution could be found.

12. Secondly, the question of measures of constraint against State property was a fundamental area of concern. No codification of the matter would be acceptable unless it provided a proper basis for enforcement of judgements in cases where it had been established that the State involved had no immunity. In that respect, the compromise solution on article 18 put forward by the Austrian delegation was an interesting one, since it reconciled the idea of allowing the State additional time to make arrangements to comply with the judgement against

it with the need for less restrictive provisions on measures of constraint once that grace period had expired. Unfortunately, the solution had not yet attracted sufficient support to provide a basis for a compromise on article 18.

13. Given the disagreement still outstanding on central issues, her delegation had reached the conclusion that at the present session it was premature to convene a conference to negotiate such a convention. It would be a profound mistake to take such a decision when there was no real prospect of reaching agreement and would risk setting back the process of codification in that area of law indefinitely.

14. Her delegation therefore proposed that the current session of the General Assembly should decide to allow States time to reflect on the issue and the chance to consider more carefully the trends and developments in the law and the scope for compromise, and to conduct any further national consultations which they might find useful, for instance with those who had practical experience of commercial law. It recommended that a fresh look should be taken in four or five years' time at the substantive issues and the Commission's recommendation to convene a conference.

15. Mr. CALERO RODRIGUES (Brazil), reviewing the work carried out by the United Nations on the jurisdictional immunities of States and their property, said that although the international community as a whole recognized the need to adopt a convention on the subject, the work of the Working Group in 1992 and 1993 and the consultations held in 1994 had identified problems but failed to reach any general agreement. Although there was disagreement on few issues, they were none the less important. They included the concept of a State for purposes of immunity; the criteria for determining the commercial character of a contract or transaction, a matter on which agreement would be reached shortly; the concept of a State enterprise; and the more delicate issue of measures of constraint against State property.

16. He agreed with the United Kingdom representative that there was little chance of reaching agreement at present, but felt that the Commission should not wait too long before convening an international conference to study the draft articles. He was convinced that delegations would show more willingness to make concessions during such a conference. To that end his delegation had prepared a draft resolution, which had gained the support of several Latin American delegations. The resolution sought to reconcile the views of delegations which wished the conference to be held shortly and those who preferred to wait. His delegation felt that the General Assembly should take a decision at the present session on the principle of holding an international conference of plenipotentiaries, in line with the recommendations of the International Law Commission. The date and venue of the conference and the arrangements for the preparatory work would be decided by the General Assembly at its fifty-first session.

17. Mr. XU Guangjian (China) said that it was particularly important to conclude an international convention on jurisdictional immunities of States and their property, since international practice in the matter was far from being

uniform. However, in no way should the practice of certain States be held up as a universal rule. The draft articles prepared by the Commission, which took full account of the views and interests of countries in favour of limited immunity, should therefore be given due recognition.

18. His delegation none the less wished to reiterate its position on a few key issues dealt with in the draft articles. First, with regard to the criteria for determining the commercial character of a contract or transaction, although the nature of the contract was a major criterion, the purpose was also relevant. In many cases, the commercial activities of a State were closely linked to the general interest; making the nature of a contract or transaction the only criterion would not cover all situations. However, in order to make the relevant provisions clearer and dispel any uncertainty, his delegation was willing to give serious consideration to the proposals put forward by the Chairman of the informal consultations on the draft articles.

19. Secondly, a distinction must be drawn between the State and State enterprises which had a separate legal personality. They were independent in their management, were responsible for their own profits or losses and were capable of bringing suit. In theoretical and practical terms, they should not be seen as part of the State. Legal proceedings against them should not involve the owner State and vice versa unless the State explicitly undertook an obligation of guarantee or gave its authorization to that end. The idea that the independence of State enterprises would lead to fraud or unfairness was not justified. Even from the standpoint of the principle of State responsibility, the action of enterprises that had a separate legal personality and were therefore different from the State could not be attributed to the latter. Otherwise, there was a serious risk of arbitrary recourse to legal proceedings against foreign countries, which would give rise to injustice and tension in international relations.

20. Thirdly, the question of measures of constraint, attachment, impounding or forced execution regarding the property of a foreign State without any distinction would inevitably lead to tensions among States. Immunity from jurisdiction with regard to legal proceedings and immunity from execution were two different concepts. The fact that a State waived the former did not mean that it also waived the latter. Both required an explicit waiver in writing by the State. Concerning specific measures of restraint, his delegation was opposed to the attachment of State property prior to judgement and supported the provisions in the Commission's draft articles on linkage between the State property against which judgement was to be executed and the agencies or instrumentalities which sued or were being sued. To set a time-limit for a State to execute the judgement of a domestic court of a foreign State, to make such execution a treaty obligation or to introduce dispute settlement mechanisms into the convention would only make the question of State immunity more complex and therefore impede early agreement on a convention.

21. Lastly, his delegation believed that the consultations of the Committee's Working Group over the past three years had demonstrated that, although differences remained on the question of State immunity, the draft articles

prepared by the Commission had, to the greatest extent possible, reflected the compromises reached between various positions. It therefore believed that great caution should be exercised in considering the convening of an international conference on the subject.

22. Mr. MARTENS (Germany) said he believed that since the discussions on the draft articles on jurisdictional immunities of States and their property had once again proved that fundamental differences of opinion continued to exist, the convening of a codification conference at the current stage would be in vain. Neither did he believe that it would be useful to continue the discussion in the Sixth Committee. Instead, it would be preferable to take a fresh look at the draft articles in a few years' time. An analysis of the development of international law in the field gave him confidence that the differences of opinion that prevented a compromise at the current stage could have vanished by then. His delegation continued to maintain its view, however, that with regard to which criteria should prevail in determining whether a contract or a transaction was of a commercial nature, only the objective nature of a contract or a transaction involving a foreign State, and not its subjective purpose, could determine whether the State was entitled to immunity. Legal transactions with foreign States would carry a risk impossible to calculate if the purpose of State actions were to constitute a criterion. In the course of the informal consultations, various compromise proposals had been presented which admitted a reference to the purpose of a transaction if that purpose was relevant to the invocation of immunity under the national law of the State concerned. Those proposals would make it too difficult for a party involved in a transaction with a foreign State to predict whether it would be able to pursue its claim in court. Furthermore, the question of reciprocity would arise, since the granting of State immunity would necessarily differ according to the applicable law.

23. Moreover, the idea of requiring a general declaration by a State to refer to the criterion of purpose would solve none of the problems posed. Since such a general declaration would be unable to take into account changes that might occur in the law and practice of a State, it would remain difficult for the private party to predict in which situations the contracting State could invoke immunity. A specific notification by the State concerning the potential relevance of the purpose criterion would be preferable to a general declaration, although that solution still left too much uncertainty in that it did not require the consent of the private party.

24. If, in addition to establishing the nature of the transaction as the primary criterion, the parties could also expressly agree to the designation of a transaction as non-commercial, the granting of immunity would not be left to the discretion of a foreign State involved in the transaction. The merit of that proposal was that, in cases of doubt, the objective nature of the transaction would be the decisive criterion.

25. In his delegation's view, the issue of State immunity and enforcement measures was an essential component without which the draft articles would be robbed of their justification. The provision of draft article 18, paragraph 1 (c), according to which enforcement measures would be restricted to

property with some connection to the claim, constituted a limitation of the liability of the foreign State that went too far, since it would amount to a limited exemption from the financial consequences of commercial transactions engaged in by a State. The interest of a State party to a transaction was already sufficiently protected by the remaining limitations contained in articles 18 and 19.

26. Prejudgement measures should be subject to the same legal regime as postjudgement measures. The exclusion of measures of constraint intended to afford temporary protection could endanger the implementation of judgements against a State party in cases where it did not enjoy immunity.

27. As for the treatment of State agencies or other legal entities connected with the State, the question was primarily whether, as compensation for the liability of such entities, it would be possible in certain cases to have access to the property of the parent State. Under those circumstances, to exclude any possibility of recourse to the State would enable the latter to avoid financial liability for commercial transactions by setting up independent entities.

28. Concerning the granting of immunity in the case of contracts of employment involving a State, his delegation supported protection of the employee to the greatest possible extent.

29. Concerning the cost of legal proceedings when the State was the plaintiff, under article 22, paragraph 2, a State was not required to provide security, even as plaintiff. Since that would constitute an unfair risk for the defendant regarding the cost of the proceedings, that provision should be changed.

30. His delegation pointed out once again that dispute settlement procedure would substantially help in the actual implementation of a convention on jurisdictional immunities of States and their property. It would therefore be presenting a proposal along those lines when the draft articles were being reviewed.

31. Lastly, his delegation remained committed to the adoption of a convention on jurisdictional immunities of States and their property in the framework of a codification conference, as such a convention would undeniably provide for more certainty with regard to State immunity.

32. Mr. STRAUSS (Canada) said that it was clearly in the interest of the international community to have a convention that both codified and progressively developed international law in the area of jurisdictional immunities of States and their property and enjoyed sufficient support to ensure that most States became parties to it. Much effort had been put into achieving that goal in the Commission, in the Working Groups that had met in 1992 and 1993 and during the consultations that had taken place earlier during the current session of the General Assembly. His delegation had reluctantly concluded, however, that the achievement of that goal would not be possible at the current stage due to the differences which existed among significant numbers of States on issues that were fundamental to such a convention. The Commission was to be

commended for the quality of the draft convention that it had prepared in which the views of most members of the international community were taken into account. Tribute should be paid in particular to Mr. Calero-Rodrigues, who had chaired the meetings of the Working Groups, as well as the consultations. Unfortunately, however, even skills of his order could not reconcile the irreconcilable. The issues had been defined clearly and the positions stated clearly. Until State practice had been developed further and taken a more focused direction, or until States were willing to alter their positions significantly to achieve a compromise, there appeared to be little likelihood of a consensus in the immediate future.

33. His delegation therefore supported postponing consideration of the matter for the time being. Sending a text to a diplomatic conference prematurely might produce two equally undesirable results. On the one hand, the failure of such a conference to reach a compromise would damage the Commission's credibility and affect the process of developing international law in the United Nations. On the other, acceptance by a conference of a convention that few States would sign or ratify would have similar consequences. The need to ensure effective use of the budgetary resources of the United Nations also militated in favour of postponing consideration of the question. It was to be hoped that the delay would allow the positions of Governments on the fundamental provisions to converge sufficiently to allow the conclusion of a convention that could command widespread support.

34. Mr. KIM (Republic of Korea) said that his delegation generally agreed with the alternatives solutions for several substantive issues proposed by the Chairman of the informal consultations, Mr. Calero-Rodrigues. However, despite the potential for compromise in those proposals, his delegation was concerned that they might deviate slightly from the general trend of accepting restrictive immunity by giving States considerable latitude in order to broaden the options available to them. Also, while the Chairman's proposals would ensure a considerable degree of certainty in terms of participation by States, they might change the convention in such a way as to lead to inconsistent application by the parties. His delegation feared that seeking solutions only on the basis of compromise could eventually result in a unduly complex structure with respect to the convention regime.

35. His country was among those that supported the restrictive theory of State immunity in the context of the codification and progressive development of international law. From that perspective, a number of comments were in order regarding the issues discussed during the informal consultations. First, with respect to the criteria for determining the commercial character of a contract or transaction, giving States full discretion in applying the purpose criterion might allow them arbitrarily to disregard the nature of the contract or transaction. Consideration should therefore be given to how the discretion of States could be limited without prejudice to the positive elements in the Chairman's suggestion to permit the use of two criteria. Also, with respect to notification to the other, private party, it would be desirable to set the time-limits well before the conclusion of a contract.

36. Second, with regard to the issue of contracts of employment, provided for in article 11, his delegation agreed with many others that the provisions in paragraph 2, subparagraphs (a) and (c), might encroach on a State's interest in protecting its domestic labour force. Furthermore, subparagraph (a) seemed too general in that it did not lay down criteria for deciding which functions were closely related to the exercise of governmental authority. He suggested three possible ways of clarifying the general issue: drawing up in a separate annex an exhaustive list of employees entitled to immunities; inserting several broad categories of employees in subparagraph (a); or adding a separate provision to the effect that dual criteria would be applied, as in the case of commercial contracts or transactions.

37. As for subparagraph (c), he feared that it might be irreconcilable with the principle of non-discrimination based on nationality. It appeared to deprive nationals of a third State of any legal protection. That subparagraph should therefore be deleted and the matter left to the States in their domestic legislation. If it was not, then, as proposed by the Australian delegation to the Working Group in 1993, the text might stipulate that employer States could invoke immunity only in proceedings filed by their nationals or residents at the time when the contract of employment was concluded.

38. Third, concerning measures of constraint against State property, his delegation fully supported the Chairman's proposal, since voluntary compliance by States was the sole means of implementing measures of constraint.

39. In conclusion, he hoped that consensus on the outstanding issues could be reached very quickly. He was convinced that completion of the work on the convention on jurisdictional immunities of States and their property would be a milestone in the codification and progressive development of international law.

40. Mr. TRAUTTMANSDORFF (Austria) said that, three years after the Commission had presented its draft articles, there was still considerable doubt as to whether the texts in question were sufficiently mature to warrant early convening of a diplomatic codification conference. No one questioned the Commission's enormous efforts or the outstanding quality of its work. It had endeavoured to reconcile conflicting elements, such as the nature and purpose criteria for determining the commercial nature of a transaction, and to devise definitions that covered as many constitutional systems as possible. Regrettably, it had not been able to bridge the gaps between the different views. Those gaps were due not to the "whims" of the participating experts but to basic differences among the various legal systems. It was therefore important that the Commission had made the basic legal approaches taken very clear by preparing carefully worded commentaries on the different draft articles.

41. Indeed, the ensuing discussions in the Working Group, skilfully led by Mr. Calero-Rodrigues, had revealed clearly the breadth of the gaps, as well as the fact that they essentially involved basic notions on which many provisions of the draft were dependent. Nevertheless, the manner in which the Chairman had organized the Working Group's discussions had made some reconciliation of

positions possible, as in the case of the nature and purpose criteria. The Chairman's very concise report on the informal consultations, particularly his conclusions, could provide an extremely useful basis for future work on the draft articles submitted by the Commission. The format employed by Mr. Calero-Rodrigues, namely definition of the issues still pending, followed by presentation of possible bases for compromise, should allow very focused consideration of those issues. The quality of the Chairman's conclusions was worthy of the highest praise. Nevertheless, the report showed that much remained to be done in order to turn the draft articles into universally accepted rules.

42. His delegation believed that a decision with respect to further work should be taken during the current session of the General Assembly. There were two possible options. The first would be to entrust the responsibility for reconciling the various views to an early codification conference, bearing in mind that its failure would be a serious blow to the codification of rules on the jurisdictional immunity of States. The second would be to avoid taking a hasty decision on the date of a diplomatic conference and to continue the preparatory work for such a conference in order to improve the chances of its success. Given the situation, his delegation favoured the second option. It thought that the conclusions of the Chairman of the Working Group merited further careful, detailed consideration by Governments with a view to clarifying the possible options for a viable compromise on basic issues while avoiding the temptation of trying to impose any one legal approach by means of political pressure or majority rule. Thus his delegation believed that a decision on the exact date of a conference should be postponed until it was possible to assess the chances for the success of such a conference with relative certainty.

43. Moreover, his delegation believed that the definitive adoption of the texts relating to the statute for an international criminal court and the law of the non-navigational uses of international watercourses should be given priority, and would, in any case, represent a heavy burden of codification for the international community for another two or three years. His delegation, however, did not share the view that the whole of the preparatory process should be placed on hold for several years. The content and structure of the conclusions of the Chairman of the informal consultations provided an excellent basis for once again inviting comments by States. States could base their comments on the conclusions of the Chairman contained in document A/C.6/49/L.2, to whose structure they should be linked. In particular, States could indicate to what extent the compromise solutions suggested by the Chairman of the informal consultations or the compromise texts identified as such in the draft articles of the Commission could serve as a basis for accommodating their particular concerns. Those comments could be once again considered by the Working Group or another expert body meeting during one of the forthcoming sessions of the General Assembly. Such a meeting would require more than just a few days, however, and the body concerned should have a clear mandate to prepare a diplomatic conference by defining the core issues which the conference would have to decide and refining the solutions for a possible compromise.

44. In the light of the draft articles and the commentaries submitted by the Commission, together with the debates within the informal consultations and the compromise proposals put forward by its Chairman, the likelihood of a broadly accepted solution being found for the issues at stake varied. With regard to article 2, paragraph 1 (c), and the distinction between acta jure gestionis and acta jure imperii, the proposed solution of applying the nature criterion while providing for the possibility of agreeing on the application of the purpose test by means of a declaration or notification seemed to provide a realistic basis for a solution. Regarding the concept of a State as defined in article 2, paragraph 1 (b), a solution similar to that proposed by the Chairman of the informal consultations seemed sufficiently flexible to be broadly acceptable. As for the concept of a State enterprise covered by article 10, paragraph 3, a pause pending the convening of a diplomatic conference could indeed facilitate a solution, as many States were in the process of privatizing their State enterprises or of organizing them as legally independent bodies. Many States were developing relevant judicial practice within their legal systems.

45. His delegation had played an active part in efforts to accommodate the different approaches to the application of measures of constraint to satisfy valid judgements against a State or State property. The relevant provisions were contained in articles 18 and 19. Considerable efforts were still required to identify solutions that were acceptable to the different legal systems and to perfect ways of enforcing judgements. The main issue was to make further refinements in procedures guaranteeing the satisfaction of legally valid and binding judicial claims against a State and its property while minimizing interference with the sovereignty and official activities of States. As the Chairman of the informal consultations had observed, the possibilities for refining the compromise solutions had not been fully exhausted, for lack of time. Although Austria favoured an extensive approach as far as the execution of legal claims against State property was concerned, the possibilities outlined by the Chairman for possible solutions went in a direction which to a large extent met with his delegation's support. A solution on the issue of prejudgment measures also largely depended on the application of post-judgement measures of constraint. As indicated in the Chairman's conclusions, the possibilities of finding universally accepted solutions with regard to measures of constraint were, furthermore, closely interrelated with the existence of a set of rules on the settlement of disputes, which should be carefully defined before a conference was convened. The fact that State immunity to a large extent involved the relationship between a State and private persons probably required a far more sophisticated system than conventional procedures for settling disputes between States. The proposals put forward in that respect were useful but did not yet meet those requirements.

46. His delegation believed that further efforts would have to be deployed in order to reach a level of preparation that justified the considerable investment of resources entailed by the convening of a diplomatic codification conference. It was well known that Austria, which had in the past hosted several codification conferences had assembled considerable experience in that field. At a time of budgetary constraint, future conferences on the codification of international law would have to be prepared to justify the expenditure they

entailed. Accordingly, it made little difference whether the resources were provided by the Government hosting the conference or by the United Nations. The proposals made by his delegation for further work on the issue were largely influenced by Austria's experience in that area.

47. Ms. JACOBSON (United States of America) said that her Government continued to support the codification of the customary international law principles of immunity on the understanding that such codification should reflect the most modern developments of the law and incorporate clear rules of restrictive immunity. Her delegation was gratified that the sessions of the Working Group and the informal consultations had produced several areas of agreement. Her delegation noted, in particular, the progress achieved on article 2, paragraph 1, concerning the definition of a "State" for the purposes of immunity. It also thanked the Chairman of the informal consultations for his creative proposal for compromise on the issue of the legal personality of a State enterprise in article 10, paragraph 3, which was of great interest to the United States. However, her delegation regretted that the consultations had failed to produce consensus on two key issues, namely, the criteria for determining the commercial character of a transaction and measures of constraint. On the first of those issues, the trend in customary law was clear: the only admissible criterion was the nature test. Without a clear and unequivocal provision to that effect, the United States would not be able to accept the convention. Moreover, the debates on measures of constraint had revealed wide differences of opinion among States concerning the fundamental question of whether State property was ever to be subject to judicial constraint. Clearly, more thought and further work was needed in that area.

48. The United States also noted that there were some significant gaps in the Commission's text. Article 11, in particular, concerning contracts of employment, failed to address the major issues in that sphere. They included the cutting back and reorganizing of diplomatic and consular facilities, the bankruptcy of mandatory social security systems and the conflicts between local labour laws and the ability of diplomatic facilities to perform their mission. It was unfortunate that nothing had actually been done to close those gaps.

49. The United States believed that the time had come to step back and reflect upon the still unresolved key issues of the convention. Prudence and good sense required that the international community take a few years to evaluate changes in customary law and practice in the light of the Chairman's proposed bases for compromise. It would then be able to return to the effort with, it was to be hoped, improved prospects of finding a common ground.

50. Ms. CARAYANIDES (Australia) said that her delegation remained of the view that a widely accepted convention on jurisdictional immunities of States and their property would be a contribution to international law and of considerable practical benefit, particularly in international commerce. Dealings between States and foreign natural and juridical persons were commonplace, and the jurisdictional immunities of States and their property was one of the areas of international law on which domestic courts were frequently called upon to rule. An international convention establishing universally applicable principles would

bring predictability, stability and, one would hope, simplicity to an area of international law in which there had always been a lack of uniformity and a considerable measure of uncertainty. Her delegation had hoped that the informal consultations held in the current year might succeed in identifying solutions to the major outstanding issues. It regretted that its hope had not been fulfilled.

51. In the informal consultations, five issues had been considered, namely, the concept of a State for purposes of immunity (art. 2, para. 1 (b)), the criteria for determining the commercial character of a contract or transaction (art. 2, para. 1 (c) and art. 2, para. 2), the concept of a State enterprise or other State entity in relation to commercial transactions (art. 10, para. 3), contracts of employment (art. 11) and measures of constraint against State property (arts. 18 and 19). It was her delegation's impression in relation to the first, third and fourth of those issues that, although no specific proposals had yet been agreed upon, the possible bases of compromise identified by the Chairman could prove fruitful. On the other hand, delegations were still at some distance from agreement on article 2, paragraph 2, dealing with the use of the criteria of nature and purpose for characterizing a transaction as commercial, and on the question of measures of constraint, especially in relation to article 18.

52. With regard to the criteria for determining the commercial character of the contract or transaction, the main division of opinion was between States which believed the nature of a transaction should be taken into account in determining its commercial character and those which considered that the purpose of the transaction should be considered. While her delegation would prefer to have the nature criterion applied as the sole test, it had no objection in principle to the purpose test being applied subsequently by a court if the parties knew before a contract was entered into that such would be the case and had agreed to enter into the transaction on that basis.

53. The Chairman of the informal consultations had suggested that a compromise solution might be to give the State concerned the option of indicating that purpose was the relevant criterion under its national law and practice, either by means of a general declaration in relation to the convention or by means of a specific notification to the other party in relation to a particular contract or transaction, or a combination of the two. That would be a compromise which addressed the concerns of both the States which wanted the purpose of a transaction to be taken into account and the States which were concerned at the uncertainty that would engender. If compromise could ever be achieved on that issue, that was the approach most likely to succeed. However, by the end of the informal consultations, it was clear that not all delegations were ready to accept that formulation. Furthermore, even among those which did, there was a further issue dividing them. Her delegation, for instance, considered that it should always be open to the parties expressly to agree whether or not a transaction was commercial. Other delegations, on the other hand, were of the view that if purpose was a relevant criterion, the parties should not be able to agree to the contrary. Thus, there were still obstacles to general agreement on article 2, paragraph 2.

54. The situation with respect to measures of constraint against State property seemed even more difficult. The principal concern of Australia and others was to ensure that where judgement was given against a foreign State in accordance with the draft articles, the judgement would in fact be satisfied. Under the draft articles, the conditions for execution were so restrictive that they excluded the possibility of enforcement proceedings in many cases. One possibility considered in the informal consultations had been to delete the requirement of a connection between the judgement and the property in cases of post-judgement execution while retaining such a requirement in cases of interim precautionary measures. That was a compromise which her delegation could support, but again there had been no general agreement.

55. However, Australia did not insist that a strengthening of measures of constraint was the only possible solution. Measures of constraint could only be effective where the defendant State had assets in the territory of the forum State. A satisfactory solution might therefore be to incorporate in article 18 additional elements for ensuring that judgements were effective, such as an obligation to comply with a judgement given in accordance with the draft articles, the possibility of recognition and enforcement of judgements in third States, and appropriate dispute settlement procedures. It must, however, be acknowledged that there had also been no general agreement on those proposals in the informal consultations.

56. Concerning the Commission's recommendation that a conference of plenipotentiaries should be convened to conclude a convention on the subject, her delegation continued to be firmly of the view that a date for a diplomatic conference should not be set until the outstanding issues of principle had been settled. If it had not been possible to resolve those issues at three successive sessions of the General Assembly, there could be little prospect of a solution being found in the limited time available at a diplomatic conference, especially since the diplomatic conference would need to address in detail each of the other provisions of the draft articles.

57. At the same time, her delegation did not think it profitable to hold further informal consultations at the next session of the General Assembly. The issues had now been discussed exhaustively and all avenues of compromise had been explored. Had there had been any possibility of achieving general agreement, it would have been found. The inability to identify generally acceptable solutions to all issues should not be attributed to a lack of goodwill on the part of delegations. It was a reflection of the nature of the subject-matter. There had always been significant divergences in the practice of States in relation to foreign State immunity, which had been continuously evolving since the previous century. Perhaps if that evolution was permitted to continue a little longer, a point might be reached in the near future when a convention could be concluded on the topic. That goal should therefore not be abandoned, and the Committee should take up consideration of the item in several years' time, with a view to ascertaining whether there had been developments in the interim. It would be useful to invite States, in advance of resumption of discussions, to submit their written comments on the possible bases for compromise identified by the Chairman of the informal consultations in document

A/C.6/49/L.2, and to request the Secretary-General to circulate those comments in order to facilitate the further consideration of those points. The Committee could then, in the light of those comments and of its own discussions, decide on further action.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/C.6/49/L.5)

58. Mrs. DAUCHY (Secretary of the Committee) announced that the Republic of Korea had joined the sponsors of draft resolution A/C.6/49/L.5.

The meeting rose at 5.15 p.m.